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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. EDMUND JAY MARR, Defendant and Appellant.	2d Crim. No. B182366 (Super. Ct. No. PA043262) (Los Angeles County)

On March 14, 2005, after the trial court had denied his motion to suppress evidence (Pen. Code, § 1538.5)[1], Edmund Jay Marr pleaded guilty to the March 1983 second degree murder (§ 187, sub. (a)) of Elaine Graham. He reserved his appeal rights and admitted that he personally used a knife in committing the murder. (§ 12022, subd. (b).) Appellant contends the trial court erred in denying the motion to suppress and that it erred by imposing a $20 court security fee, restitution and parole revocation fines. Respondent correctly concedes error with respect to the restitution and parole revocation fines. We modify the judgment to strike those fines. As so modified, the judgment will be affirmed.

[1] All statutory references are to the Penal Code unless otherwise stated.

Facts

On the morning of March 17, 1983, Elaine Graham took her two-year old daughter to a friend's house and then left to attend class at California State University Northridge. She never returned to pick up her baby and was never again seen alive by her family or friends. Her car was discovered on March 18, 1983, parked at a shopping mall in Santa Ana. In late November 1983, Graham's remains and personal belongings were discovered by hikers in Brown Canyon, north of Chatsworth. A few weeks later, other hikers found Graham's purse, wallet and a bone. Her death was caused by a stab wound to the chest and abdomen.

Appellant was discharged from the U.S. Army in March 1983. On the afternoon of March 16, he arrived at his mother's apartment, located "catty-corner" to the CSUN campus. He spent the night with his mother and left the next morning, the same day that Graham disappeared. On the evening of March 17, appellant arrived at his sister's apartment in Orange County. She lived within walking distance of the shopping mall where Elaine's car was found.

Appellant was arrested in Westminster on April 23, 1983, for an armed robbery. As he was being taken to the police station, he told the arresting officer, Officer Silva, that he had left a bag containing his personal belongings in some nearby bushes. Appellant asked Officer Silva to retrieve the bag for him. Silva complied, placing appellant's black Samsonite bag in the trunk of the patrol car. At the police station, Silva conducted an inventory of the contents of the bag. Among other things, he found a black handled Explorer brand knife in a leather sheaf. The knife blade had a pointed tip and was sharp on both sides. Silva did not notice any blood on the knife or on any of the other items in the bag. He booked the bag and its contents, including the knife, into the property room at the station.

Officer Paul Tippin from the Los Angeles Police Department investigated Graham's disappearance. In July 1983, he received an anonymous telephone call identifying appellant as a possible suspect and stating that appellant was in custody in Westminster. In December 1983, Tippin arranged for the Westminster police department

to retain custody of appellant's knife and other personal property. He obtained the knife sometime later.

According to the medical examiner, appellant's knife "fit the dimensions of the wound tract[,]" on Graham's body. In December 1983, a forensic chemist discovered human blood in a crevice under the handle of the knife, where it joined with the blade. The blood was Type A, the same type as Graham's. After completing the tests, the forensic chemist packaged the knife and returned it to the property division. Appellant's knife was re-examined in 2002. By this time, technological advances permitted the forensic chemist to conclude that "it was 38,000 times more likely" that the blood sample from the knife came from Elaine Graham.

Appellant moved to exclude the knife and forensic evidence derived from it on the ground that Officer Silva's warrantless inventory search of appellant's bag violated his Fourth Amendment right against unreasonable search and seizure. The trial court denied the motion, finding that appellant lost any expectation of privacy in the contents of his bag when he asked Officer Silva to retrieve it for him and that Officer Silva was required to conduct an inventory search of the bag.

Discussion

In reviewing the trial court's ruling on a motion to suppress, we accept the trial court's findings of fact to the extent they are supported by substantial evidence. We independently determine whether, under those facts, the search was reasonable under the Fourth Amendment. (*People v. Davis* (2005) 36 Cal.4th 510, 528-529; *People v. Weaver* (2001) 26 Cal.4th 876, 924.)

Waiver

Appellant contends the search of his bag in December 1983, that resulted in the transfer of his knife and other property to Officer Tippin, violated his Fourth Amendment rights because it was conducted without a warrant. He contends this search cannot be justified as an inventory search because the inventory search was completed in April 1983 by Officer Silva. Respondent contends this claim has been waived because it was not raised below. We agree with respondent. The only search appellant challenged

in the trial court was Silva's April 1983 inventory search. Nothing in his moving or reply papers, or in his argument to the trial court, mentions the subsequent search by or for Officer Tippin.

Relying on *People v. Williams* (1999) 20 Cal.4th 119, appellant contends there has been no waiver because his moving papers satisfied his burden to "(1) assert[] the search or seizure was without a warrant, and (2) explain[] why it was unreasonable under the circumstances." (*Id.* at p. 129.) Appellant reads *Williams* too broadly. There, our Supreme Court held that defendants are not required "to guess what justification the prosecution will offer at the risk of forfeiting the right to challenge that justification." (*Id.*) *Williams* does not relieve the defense of its obligation to identify the particular search it contends was unreasonable. Here, appellant contended in the trial court that the April 1983 search was unreasonable. He now contends the violation occurred in December 1983, a claim he never raised below. As a consequence, the contention that the December 1983 search violated appellant's Fourth Amendment rights has been waived.

Reasonableness of Subsequent Search

Even if it had not been waived, we would reject appellant's challenge to the December 1983 search because he had no reasonable expectation of privacy in the contents of his bag once Officer Silva took custody of it at appellant's request. "Once articles have lawfully fallen into the hands of the police they may examine them to see if they have been stolen, test them to see if they have been used in the commission of a crime, return them to the prisoner on his release, or preserve them for use as evidence at the time of trial. (*People v. Roberston*, 240 Cal.App.2d 99, 105-106 [49 Cal.Rptr. 345].) During their period of police custody an arrested person's personal effects, like his person itself are subject to reasonable inspection, examination and test. (*People v. Chigles*, 237 N.Y. 193 [142 N.E. 583, 32 A.L.R.676], Cardozo, J.)" (*People v. Rogers* (1966) 241 Cal.App.2d 384, 389-390.)

In *Rogers*, the defendant was arrested for burglarizing a bar. During the booking search, 10 keys were found in his possession. While he was still in custody, an

officer from another town tested the keys and determined they fit the locks at another bar that had been burglarized. The Court of Appeal held the keys were properly tested and admitted as evidence in defendant's trial for burglary of the second bar. (*People v. Rogers, supra,* 241 Cal.App.2d at p. 388-389; see also *People v. Earls* (1980) 109 Cal.App.3d 1009, 1012 [pants worn by defendant when arrested for traffic violation properly tested for evidence of his participation in a bank robbery]; *People v. Gilliam* (1974) 41 Cal.App.3d 181, 189, superseded by statute on other grounds, *People v. Castaneda* (1995) 35 Cal.App.4th 1222 [credit card found in defendant's wallet during booking search properly examined to determine whether it was stolen].)

People v. Smith (1980) 103 Cal.App.3d 840, does not mandate a different result. In that case, the Court of Appeal found unreasonable the belated search of a jailed woman's wallet for evidence of her adult son's address and the keys to a stolen car. The court reasoned that, "since the officer's purpose in inspecting [the mother's] purse and wallet a second time was to look for at least one item not previously noted (the current address), and items whose evidentiary value had not been previously appreciated (the address and keys), the inspection involved an intrusion into whatever vestige of privacy remained to [the mother] and thus did constitute a search." (*Id.* at p. 845.)

As another Court of Appeal recently explained, "*Smith* does not stand for the broad proposition that jail inmates retain a Fourth Amendment privacy interest in property seized upon arrest and stored in the jail property room." (*People v. Davis* (2000) 84 Cal.App.4th 390, 394.) Instead, the search in *Smith* was invalid because the officer was looking for items not cataloged during the initial inventory search. (*Davis, supra,* 84 Cal.App.4th at pp. 394-395.) By contrast, in *Davis,* two distinctive rings were listed on the inventory made of defendant's belongings after his arrest. The rings were later retrieved from the police property room and used to identify the defendant as the perpetrator of two bank robberies. Distinguishing *Smith,* the *Davis* court found no Fourth Amendment violation because, when the investigating officer "opened the plastic bag [containing Davis' belongings] he was already aware the rings were inside by virtue of the inventory prepared at the time of booking. In other words, [the officer] did not

conduct a search but merely retrieved items, lawfully obtained, that law enforcement knew were in its possession." (*Id.* at pp. 394-395.)

Our case is more like *Davis* than *Smith*. Officer Silva retrieved the bag at appellant's request, after appellant was under arrest. He noted the knife during the initial inventory search. When appellant allowed Officer Silva to take custody of the bag, knowing it would be stored in the police property room, he lost any reasonable expectation of privacy in the contents of the bag. Appellant had no reasonable expectation that its contents would remain shielded from examination or testing by law enforcement. (*People v. Davis, supra*, 84 Cal.App.4th at pp. 394-395; *People v. Earls, supra*, 109 Cal.App.3d at p. 1012.) As a consequence, the December 1983 search was not unreasonable. The trial court correctly denied appellant's motion to suppress.

Ineffective Assistance of Counsel

Appellant contends that, if his Fourth Amendment claim was waived, his counsel was ineffective. We are not persuaded. Because a motion to suppress challenging the December 1983 search or the results of subsequent tests would properly have been denied, appellant was not prejudiced by counsel's failure to raise the point. (*Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Kipp* (1998) 18 Cal. 4th 349, 366.) In the absence of prejudice, we need not examine the adequacy of counsel's performance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 170.)

Court Security Fee

Appellant contends imposition of a $20 court security fee pursuant to section 1465.8 violates the ex post facto clauses of the United States and California Constitutions because his offense occurred before section 1465.8 was enacted. (U.S. Const., art. I, § 10, cl. I; Cal. Const., art. I, § 9.) Imposition of the fee does not, however, raise ex post facto concerns because the fee is civil and not punitive in nature. It has as its nonpunitive objective, "to ensure and maintain adequate funding for court security[,]" and it is imposed in both criminal and civil cases. (§ 1465.8, subd. (a)(1).) Moreover, because the fee is a relatively small amount of money, it is not " ' " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " ' " (*People v.*

Wallace (2004) 120 Cal.App.4th 867, 874, quoting *Smith v. Doe* (2003) 538 U.S. 84, 92 [155 L.Ed.2d 164, 123 S.Ct. 1140].) There was no error.

Restitution and Parole Revocation Fines

We reach a different result, however, with respect to the parole revocation and restitution fines imposed by the trial court. Respondent correctly concedes these fines were imposed in error because, unlike the court security fee discussed above, these fines have consistently been deemed "punishment." (*People v. Callejas* (2000) 85 Cal.App.4th 667, 670 [parole revocation fine is "punishment" for ex post facto purposes]; *People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31 [restitution fine is "punishment" for ex post facto purposes].) Sections 1202.4, subdivision (b) and 1202.45, pursuant to which the fines were imposed, were enacted after appellant murdered Graham. Accordingly, the fines cannot be imposed without violating the ex post facto clauses of the United States and California constitutions.

Conclusion

The judgment is modified to strike the restitution fine imposed pursuant to section 1202.4, subdivision (b) and the parole revocation fine imposed pursuant to section 1202.45. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Charles L. Peven, Judge

Superior Court County of Los Angeles

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

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